

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CALLAWAY GOLF COMPANY,

Plaintiff,

v.

ACUSHNET COMPANY,

Defendant.

C. A. No. 06-91 (SLR)

**CALLAWAY GOLF COMPANY'S *RESPONSE TO*
ACUSHNET'S CITATION OF SUBSEQUENT AUTHORITY REGARDING
ACUSHNET'S RULE 50(b) and 59 POST-TRIAL MOTIONS TO
REVERSE OR VACATE THE JURY'S VERDICTS**

Acushnet cites *Agrizap Inc. v. Woodstream Corp.*, 2008 WL 819757 (Fed.Cir. March 28, 2008) to bolster three propositions. The first two – that the ultimate conclusion of obviousness is a question of law and that the Federal Circuit has, on occasion, overturned determinations of non-obviousness – are unremarkable propositions which Callaway Golf has never disputed. More typically, of course (and in a case even more recent than the one Acushnet cites), determinations of non-obviousness are upheld – even when made by a Court, whose decisions are subject to greater scrutiny than a jury's. *See, e.g., Ortho-McNeil Pharma v. Mylan Labs Inc.*, 2008 WL 834402, at *4 (Fed.Cir. March 31, 2008) (affirming court's rejection of obviousness defense in a pharmaceutical case, and noting "[i]n sum, this clearly is not the easily traversed, small and finite number of alternatives that *KSR* suggested might support an inference of obviousness."). Callaway Golf suggests the chemistry and material science underlying golf ball design make the technology at issue in this case more like chemical and pharmaceutical cases where challenges to determinations of non-obviousness are repeatedly denied, than the apparently effective, but unfortunately obvious, Rat Zapper at issue in *Agrizap*.

With regard to the third (and last) issue, Acushnet cites dicta in a footnote that mentions the phrase "special verdict". Nowhere does the note discuss any particular verdict form or even mention FRCP 49(a). Acushnet's reference to this footnote is inapposite given: (i) the extensive authority from

this Court and the Federal Circuit describing verdict forms nearly identical to the one at issue here as being general verdicts (D.I. 455, at 39-42); and (ii) the article cited by the Federal Circuit itself in *Agrizap*¹ – Paul J. Zegger et. al, *The Paper Side of Jury Patent Trials: Jury Instructions, Special Verdict Forms, and Post-Trial Motions*, 910 PLI/PAT 701, 716 (2007) (“Federal Rule of Civil Procedure 49(a) governs special verdicts, in which a court requires that a jury return a verdict in the form of a special written finding upon each factual issue.”). The jury made no such special written findings in this case.

Dated: April 9, 2008

FISH & RICHARDSON P.C.

By: /s/ Thomas L. Halkowski

Thomas L. Halkowski (#4099)
919 N. Market Street, Suite 1100
P.O. Box 1114
Wilmington, DE 19899-1114
Tel: (302) 652-5070
Fax: (302) 652-0607

Frank E. Scherkenbach
225 Franklin Street
Boston, MA 02110-2804
Tel: (617) 542-5070
Fax: (617) 542-8906

Roger A. Denning
12390 El Camino Real
San Diego, CA 92130
Tel: (858) 678-5070
Fax: (858) 678-5099

Attorneys for Plaintiff
CALLAWAY GOLF COMPANY

¹ 2008 WL 819757, at *6 n.3.

CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2008, the attached document was electronically filed with the Clerk of Court using CM/ECF which will send electronic notification to the registered attorney(s) of record that the document has been filed and is available for viewing and downloading.

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Richard L. Horwitz
David E. Moore
Potter Anderson & Corroon LLP
Hercules Plaza
1313 North Market Street, 6th Floor
P.O. Box 951
Wilmington, DE 19899
rhorwitz@potteranderson.com
dmoore@potteranderson.com

Attorneys for Defendant
ACUSHNET COMPANY

Alan M. Grimaldi, Esq.
Joseph P. Lavelle
Brian Rosenthal
Clint Brannon
Kenneth Donnolly
Howrey LLP
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004
grimaldia@howrey.com
lavellej@howrey.com
rosenthalB@howrey.com
brannonC@howrey.com
donnellyk@howrey.com

Attorneys for Defendant
ACUSHNET COMPANY

/s/ Thomas L. Halkowski

Thomas L. Halkowski